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# LOW POWER TELEVISION IN 1994: OUTGROWING ITS SECONDARY STATUS

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Low power television ("LPTV") has been dismissed repeatedly as both a nuisance and a failure by academic critics and full-power television broadcasters innumerable times over the course of its fourteen year history.<sup>1</sup> Yet LPTV experienced an unlikely resurgence in 1994, one which seems all the more remarkable since the ambitious medium now appears to be entering into what can only be described as a classic David and Goliath struggle against far more powerful cable operators. These developments should make LPTV stations more profitable to operate and thus extremely attractive to broadcasters, causing the medium to flourish and multiply throughout the United States.<sup>2</sup>

LPTV always has been recognized as a "secondary service" that was cheaper to own and operate than either full power stations or cable television services. As such, the FCC envisioned LPTV as the perfect stepping stone that would offer minorities and ordinary citizens their first chance to get involved in broadcasting. While it cannot be denied that recent developments in LPTV have made the medium more attractive and profitable for potential broadcasters, the question remains as to whether the FCC's approach has placed LPTV stations beyond the reach of those potential broadcasters for whom the service was specifically created.

On May 19, 1994, the Federal Communications Commission ("FCC" or "Commission") announced three sweeping regulatory reforms of LPTV that

brought LPTV stations into greater alignment with regular full power stations.<sup>3</sup> First, the FCC decided to review applications for new LPTV stations using a "substantially complete" standard of review instead of the much less forgiving "letter perfect" standard.<sup>4</sup> Second, the FCC decided to allow a more liberalized showing of terrain shielding by LPTV applicants.<sup>5</sup> Third, LPTV stations could now request four-letter call signals (with an "LP"-suffix) similar to full-power television stations, instead of the awkward and confusing five-digit combination of letters and numbers previously required by the FCC.<sup>6</sup>

This Comment will compare the goals that the FCC originally anticipated LPTV would accomplish with the realities of LPTV service in America today, especially in light of the recent amendments to LPTV regulations. Part I examines the regulatory history of LPTV, detailing the numerous early conflicts with full power broadcasters. Part II reviews the FCC's May, 1994 changes to LPTV and discusses the increasing number of administrative lawsuits being filed with the FCC by LPTV broadcasters against cable operators who refuse to carry their signal. Part III analyzes why LPTV is in jeopardy of losing its local community focus to broadcasters seeking multi-channel networks. This Comment concludes that while LPTV service is now poised to make more of a mark on broadcasting in the United States after the changes, there is a considerable dan-

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<sup>1</sup> See, e.g., *Survey Says LPTVs Inhibited By Lack of Audience and Rating Information*, COMM. DAILY, Mar. 7, 1991, at 3; Michael Couzens, *LPTV: Still Afloat After a Rough Five Years*, BROADCASTING, Sept. 9, 1985, at 32; *LPTV Complaints*, BROADCASTING, Mar. 21, 1983, at 60; *AMST Asks FCC To Be More Wary of LPTV Interference*, BROADCASTING, May 21, 1984, at 92; *Translators and Religious Broadcasters Dominate LPTV: Study Says Half Carry Local Shows*, COMM. DAILY, June 5, 1992, at 7.

<sup>2</sup> *LPTV Emulating Cable*, TELEVISION DIG., May 23, 1994, at 6.

<sup>3</sup> *In re Review of the Commission's Rules Governing the Low Power Television Service, Report and Order*, 9 FCC Rcd. 2555 (1994)[hereinafter *First Report and Order*].

<sup>4</sup> *Id.* para. 8.

<sup>5</sup> *Id.* para. 12.

<sup>6</sup> *Id.* para. 22.

ger that LPTV will no longer be used to serve those communities for whom it was initially designed.

## I. THE LONG AND TROUBLED HISTORY OF LPTV<sup>7</sup>

### A. LPTV Service is Created

On September 9, 1980, the FCC authorized the creation of LPTV service in the United States, the first new broadcast service authorized in twenty years.<sup>8</sup> In doing so, the Commission claimed that LPTV would help fill the country's "large, unsatisfied demand for television service," especially in rural areas.<sup>9</sup> The FCC cited a study that showed "consumer demand for television programming exceed[ed] the supply in many areas of the country," even in major urban areas.<sup>10</sup> Thus, LPTV seemed the perfect substitute for areas where it was impractical or unprofitable for other forms of broadcast services.<sup>11</sup>

The FCC designed LPTV as a "secondary service" to fill the gaps in broadcast television coverage nationwide without interfering with full power television service.<sup>12</sup> LPTV stations were limited to power of ten watts on VHF frequencies<sup>13</sup> and 1,000 watts on UHF frequencies.<sup>14</sup> As a result, the most powerful LPTV station rarely enjoys more than a thirty mile broadcasting radius. The FCC stressed

that any LPTV station that caused harmful interference to the reception of full-power stations would have to cease operations.<sup>15</sup> To that end, the FCC adopted rules and regulations for existing translator stations—those stations in predominately rural areas that broadcast no original material of their own, but instead simultaneously re-broadcast a full power television station's signal.<sup>16</sup> The FCC linked the new service with existing "translator" stations in an effort to underscore the "secondary" status onto the medium.<sup>17</sup>

However, there were potential benefits in labelling LPTV as a secondary service. The Commission anticipated that by subjecting LPTV applicants to fewer bureaucratic restrictions, LPTV stations would be able to begin providing broadcast service more quickly.<sup>18</sup> The Commission also hoped to make LPTV stations easier and far less costly to set-up, own and operate<sup>19</sup> than full power stations so that minorities and owners of small businesses would be encouraged to enter into broadcasting.<sup>20</sup> An optimistic FCC predicted that there one day would be as many as 4,000 LPTV stations in the United States.<sup>21</sup> The Commission also recognized that LPTV broadcasters would compete directly with cable operators,<sup>22</sup> and hoped that this competition would provide nation-wide television service that was both less expensive and higher in quality.<sup>23</sup>

<sup>7</sup> See James Michael Kendrick, *The F.C.C. and Low-Power Television: Managing the New Gold Rush*, 36 RUTGERS L. REV. 233, 238 n.22 (1983)(reviewing the early developments of LPTV).

<sup>8</sup> *In re An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Notice of Proposed Rule Making*, 82 F.C.C.2d 47 (1980)[hereinafter 1980 NPRM].

<sup>9</sup> *Id.* para. 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* para. 30. "Low power broadcast television will be particularly important in serving sparsely settled areas, in other locations where full service broadcast stations and cable are not in a position to increase program choices, and in some densely populated urban areas where the cost of laying cable is extremely high." *Id.*

<sup>12</sup> *Id.* paras. 6-7.

<sup>13</sup> *Id.* para. 51.

<sup>14</sup> *Id.* para. 52.

<sup>15</sup> *Id.*

<sup>16</sup> Couzens, *supra* note 1, at 32. The author of the article cited herein was an FCC official at the inception of LPTV, who stated, "we decided to graft LPTV onto the existing rural translator service. This gave the service a 'motherhood' patina, rural America being a concept that always stood with mom and apple pie." *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> 1980 NPRM, *supra* note 8, paras. 7-8. As a secondary service, FCC officials anticipated that LPTV as a medium would be much more flexible than its full power counterpart, with relaxed technical standards and liberalized ownership rules, thus allowing rapid implementation of the service. *Id.*

<sup>19</sup> Jill Abeshouse Stern, et al., *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATN. U. L. REV. 529, 540 (1983). "[D]epending on the proposed operation, a basic version may cost only \$50,000 to build, compared with \$1 million or more for a conventional television station, thus enabling those with relatively little capital to become broadcasters." *Id.*

<sup>20</sup> 1980 NPRM, *supra* note 8, para. 76.

<sup>21</sup> *LPTV Manufacturer Chalks Up Another Year of Losses*, BROADCASTING, Jan. 6, 1986, at 166.

<sup>22</sup> 1980 NPRM, *supra* note 8, para. 30. The Commission noted that these rules would serve to encourage competition between LPTV stations and cable operators and bring better service to the public. *Id.*

<sup>23</sup> *Id.* Indeed, the FCC noted that competition between LPTV and cable operators would force each medium to further improve upon its own respective strengths. Also, the Commission noted that cable was efficient in providing television service to more populated areas, while LPTV would be effective in offering television service to relatively rural areas and even inner cities where it simply was not cost efficient for cable operators to lay cable. *Id.*

## B. Regulatory Hurdles in Setting up LPTV

Initially, the FCC was so anxious in generating enough interest in LPTV that it encouraged applications for new stations, announcing that no "freeze" on applications was necessary even though it had not finalized the rules regarding the granting of LPTV licenses.<sup>24</sup> As a result, potential LPTV licensees flooded the FCC with nearly 5,000 applications, forcing the agency to eventually institute a freeze on applications on April 9, 1981.<sup>25</sup>

Congress, appalled at the resulting backlog of LPTV applications, ordered the FCC to devise a lottery system to award LPTV licenses, with a preference for ethnic minority applications.<sup>26</sup> However, the FCC disliked the idea of application preferences, and had to be ordered by Congress again in 1983 to find a solution to the growing application debacle.<sup>27</sup> Finally, the Commission designed an admittedly complex lottery system that seemed to satisfy both Congressional requirements and the practical needs of the FCC who, at this point, was rapidly becoming besieged by LPTV applications.<sup>28</sup> The Commission also developed a system whereby LPTV applications would only be accepted during "windows," a designated number of days during which the FCC would accept LPTV applications.<sup>29</sup>

Additional problems affected the initiation of

LPTV service. It took nearly two years for the Commission to implement a computer system capable of processing LPTV applications.<sup>30</sup> Until then, LPTV applications had to be processed manually, limiting the review of applications to just thirty-five per month.<sup>31</sup> Furthermore, the Commission failed to institute final rules governing LPTV service until 1982.<sup>32</sup> Under the Final Rules, LPTV applications were to be reviewed using a strict "complete and sufficient" standard.<sup>33</sup> Furthermore, LPTV stations were assigned a five-digit combined alpha-numeric call sign, instead of the traditional 4-letter call signs used by full power television stations.<sup>34</sup> The Commission also noted the inherent difficulties of reviewing individual LPTV applicant's terrain shielding claims, and resolved that such claims could only be heard in special proceedings.<sup>35</sup> Finally, the Commission expanded its rules regarding "major modifications" to require a formal application any time there were changes to an LPTV station "that would have a significantly greater or preclusive effect than the existing authorization."<sup>36</sup> As such, an application for a major modification was "subject to competing applications and petitions to deny."<sup>37</sup>

In fairness to the Commission, a large part of the delay in initiating LPTV service cannot be blamed wholly on its administrative inadequacies and the re-

<sup>24</sup> *Id.* para. 78. "We do not believe that a 'freeze' on low power applications would serve the public interest." *Id.*

<sup>25</sup> Couzens, *supra* note 1, at 32.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Second Report and Order*, 93 F.C.C.2d 952 (Mar. 31, 1983)[hereinafter *1983 Second Report and Order*]. The Commission noted in this Report that lotteries (referred to also as "random selection proceedings") always would be used for LPTV applicants in those situations where there are competing applications filed with the Commission for a single license. *Id.* para. 1. As a result, the FCC expected LPTV station licenses and construction permits to be granted much more quickly, since competing applications simply would be decided by lottery rather than having to go through the much more time consuming alternative proposal of holding a comparative preference hearing. *Id.* paras. 18, 23. Under the lottery imposed by the FCC, applications for an LPTV license that are deemed complete are published in a Public Notice known as an "A-list." Any applications remitted in response to the notice are placed on a "B-list" and a date is then fixed for the lottery, which will randomly decide who is awarded the license. *Id.* para. 26.

<sup>29</sup> *FCC May Revise its Methods of Processing LPTV Applications*, BROADCASTING, Dec. 19, 1983, at 87.

<sup>30</sup> *LPTV Complaints*, *supra* note 1, at 60. Finally, in 1983, Congress authorized funds with which to purchase a new com-

puter system capable of processing LPTV applications. *Id.*

<sup>31</sup> *Plotting the Future of LPTV*, BROADCASTING, Jan. 31, 1983, at 69.

<sup>32</sup> *In re An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Final Rule*, 47 Fed. Reg. 21468 (1982)[hereinafter *1982 Final Rule*].

<sup>33</sup> *Id.* para. 51. "A low power application must be complete and sufficient to be accepted for filing . . . This represents a departure from the standard set out in § 73.3564(a) of our rules, under which 'substantially complete' applications are acceptable for filing." *Id.*

<sup>34</sup> *Id.* para. 97. In 1982, the Commission refused to change LPTV call signs to reflect those issued to full power television stations, noting that LPTVs were assigned call signs similar to translator call signs. *Id.*

<sup>35</sup> *Id.* para. 37. See also *1980 NPRM*, *supra* note 8, para. 56. The FCC has established separation standards that regulate the distance between television transmitters. Ordinarily, the FCC will not grant licenses for proposed stations that do not meet these minimum separation standards. However, in many instances, the natural terrain in certain areas is such that it forms a "shield" that will prevent interference with another nearby television station from occurring, despite the fact that the two stations are technically too close to each other. In 1980, the FCC proposed that such terrain shielding claims be heard on a case-by-case basis. *Id.*

<sup>36</sup> *1982 Final Rule*, *supra* note 32, para. 82.

<sup>37</sup> *Id.*

sulting battles between the executive and legislative branches of government. Full power broadcasters, ever fearful of this potential new l'enfant terrible, quite often meddled in the regulatory affairs of LPTV in both its embryonic stage and later formative years. The full power broadcasters demanded and received enough concessions from the FCC to hopelessly mire the medium in red tape and bad publicity from which the FCC is only now recovering.<sup>38</sup> Even the seemingly benign Corporation for Public Broadcasting filed suit to limit the application acceptance period for LPTV applications.<sup>39</sup>

However, full power broadcasters were not opposed to all progress regarding LPTV applications, only that which made LPTV more competitive to full-power television. Full power broadcasters actively lobbied the FCC to separate low power applications and give priority to the applications for proposed "translator" stations (which would simultaneously re-broadcast a full power station's signal) over the applications for proposed LPTV stations (which would broadcast original programming).<sup>40</sup>

### C. The Elusive Goal of Mandatory Carriage and Its Effect on LPTV

On October 5, 1992, Congress overrode a presidential veto to create the Cable Television Consumer Protection and Competition Act ("Cable Act").<sup>41</sup> One of the more controversial aspects of the new law involved the requirement that cable operators carry local commercial stations' signals over their lines (must-carry or mandatory carriage provisions).<sup>42</sup>

LPTV station owners and operators lobbied tirelessly for universal "must carry" status.<sup>43</sup> The National Association of Broadcasters ("NAB"), a full power television lobbying organization, argued that mandatory carriage would be unfair because LPTV stations were not subject to the same regulations regarding, among other things, multiple ownership and equal time or reasonable access rules as full power broadcasters.<sup>44</sup> The NAB also argued that mandatory carriage for LPTV stations would "extend their reach well beyond [the] 15-30 mile secondary service areas for which they're licensed and dramatically change [the] status assigned to them by [the] FCC."<sup>45</sup>

While the Cable Act did give full-power stations mandatory carriage rights,<sup>46</sup> LPTV operators could only seek mandatory carriage when there were not enough full-power stations in an area to fill the required number of allotted slots set aside by law for local television broadcast stations.<sup>47</sup> This was provided that the LPTV station was not located in one of the 160 most populated metropolitan areas in the United States.<sup>48</sup> Furthermore, the population of the community where the LPTV station was located could not exceed 35,000.<sup>49</sup> These restrictions under the Cable Act reiterated LPTV's status as a secondary service.<sup>50</sup>

Upon failing to win universal mandatory carriage, the Local Community Broadcasters ("LCB"), an LPTV special interest group, became an intervenor-defendant in *Turner Broadcasting System, Inc. v. FCC*,<sup>51</sup> the definitive lawsuit that followed passage of the Cable Act.<sup>52</sup> In *Turner*, LPTV operators alleged that the failure to give them mandatory car-

<sup>38</sup> See, e.g., *AMST Asks FCC to be More Wary of LPTV Interference*, BROADCASTING, May 21, 1984, at 92.

<sup>39</sup> See Kendrick, *supra* note 7, at 238 n.22. "The Corporation for Public Broadcasting also filed a Motion for Stay in the District of Columbia Circuit . . . to enjoin the F.C.C. from processing or granting any [LPTV] applications . . . . This action was essentially mooted by the F.C.C.'s decision, effective April 9, 1981, to partially freeze new applications." *Id.*

<sup>40</sup> *Proposal to Give Translator Applicants Priority Gets Broader Support*, BROADCASTING, Feb. 20, 1984, at 70. In this manner, full power broadcasters sought to use low power television in an effort to expand their own audiences, while minimizing the possible competition from LPTV stations that originated programming.

<sup>41</sup> 47 U.S.C. § 534.

<sup>42</sup> *Id.* § 534(a).

<sup>43</sup> See Linda Haugsted, *LPTV Outlets Fight For—and win—Cable Carriage*, MULTICHANNEL NEWS, Mar. 9, 1992, at 32; Harry A. Jessel, *Cable Rereg Bill Hits Home Stretch*, BROADCASTING, Sept. 14, 1992, at 6; *Telco-Cable, Must-Carry, Program Rights Major Items at Cable Bill Markup*, COMM.

DAILY, July 26, 1990, at 2.

<sup>44</sup> *Telco-Cable, Must Carry, Program Rights Major Items at Cable Bill Markup*, COMM. DAILY, July 26, 1990, at 2.

<sup>45</sup> *Id.* at 3.

<sup>46</sup> 47 U.S.C. § 534(a) and (b)(1)(A)(Supp. IV 1992). If the cable system had 12 or fewer "usable activated channels," it would have to set aside one-third or at least three of those channels for local full-power commercial stations. *Id.*

<sup>47</sup> *Id.* § 534(c)(1). Such LPTV stations were deemed to be "qualified low power stations." If the cable system had 35 or fewer channels, it would be required to carry one qualified LPTV station. If the cable operator had more than 35 channels, it would be required to carry two qualified LPTV stations' signals. *Id.*

<sup>48</sup> *Id.* § 534(h)(2)(E).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* § 534(h)(2).

<sup>51</sup> 819 F. Supp. 32 (D.D.C. 1993)(holding, *inter alia*, that the denial of "must-carry" status to LPTV stations did not violate free speech rights).

<sup>52</sup> *Id.* at 37.

riage rights under the Act violated their First Amendment rights to free speech and equal protection because it "imped[ed] the ability of LPTV stations to reach their audiences,"<sup>53</sup> and sought "expansive mandatory carriage rights, similar to those provided to full power broadcasters."<sup>54</sup>

The Court held otherwise. First doubting that it had the power to order such a remedy,<sup>55</sup> but finally reasoning that since LPTV was created as a secondary service, Congress intended that LPTV did not "enjoy[] rights coextensive with full power television."<sup>56</sup> The Court thus declined to impose such rights where Congress decided not to afford them to LPTV operators.<sup>57</sup>

## II. THE FCC BRINGS LPTV MORE INTO LINE WITH FULL POWER TELEVISION

### A. The May 19, 1994 Changes

As discussed in Part I, *supra*, on May 19, 1994, the FCC adopted a *First Report and Order* that announced three significant changes to LPTV service, including a lower standard of review for LPTV applications, a more liberalized terrain shielding policy and new four letter call signs (with "LP" suffix).<sup>58</sup> The Community Broadcasters Association, an LPTV lobbying group formed in 1984<sup>59</sup> had lobbied

extensively for these changes over three years.<sup>60</sup> Current FCC Chairman, Reed Hundt, admitted somewhat sheepishly that these changes were a long time coming and simply reflected the lack of manpower at the FCC.<sup>61</sup> Chairman Hundt also added that he liked to help LPTV stations whenever he could.<sup>62</sup> In order to determine the full impact of the modifications, it is necessary to review each change specifically.

### 1. Lower Application Acceptance Standard

In the May 19, 1994 *First Report and Order*, the Commission stated that future LPTV applications would be reviewed using a "substantially complete" standard rather than the "letter perfect" standard.<sup>63</sup> The standard now is essentially the same as that required for full-power applications.<sup>64</sup>

In comparing the two standards, the "substantially complete" standard is much more lenient.<sup>65</sup> Under the previously used standard, the Commission refused to accept LPTV applications that were not "letter perfect."<sup>66</sup> The Commission returned the application to the applicant, who then had no other option but to wait until the announcement of a new filing window.<sup>67</sup> The Commission implemented such a stringent standard in response to the avalanche of applications it received for LPTV licenses.<sup>68</sup>

<sup>53</sup> *Id.* at 49-50.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 50.

<sup>56</sup> *Id.* at 51.

<sup>57</sup> *Id.* The district court, sitting in a three-judge panel, ultimately granted summary judgment in favor of the government and against the cable operators. *Id.* But see *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994). The Supreme Court, in *Turner*, recently vacated the district court's decision, holding that while the award of "must-carry" status for full power broadcasters under the 1992 Cable Act was a content-neutral restriction, and while the government had a legitimate interest in protecting local broadcast structures, the government still had to demonstrate that local broadcasters would suffer financial difficulties as a result in the absence of must-carry status. *Id.* at 2472. Thus, since there were still issues of material fact to be decided, the Supreme Court vacated the district court's decision to grant summary judgment and remanded the case to allow all parties the opportunity to more fully develop the record in support of their contentions. *Id.*

As for LPTV, the Court ordered the district court to consider whether Congress' original failure to grant must-carry status to low power stations was a content-based or content-neutral restriction, since the interested parties "ma[d]e only the most glancing reference to the operations of, and justifications for, the low-power broadcast provisions" under the Cable Act. *Id.* at 2460 n.6.

<sup>58</sup> *First Report and Order*, *supra* note 3.

<sup>59</sup> *CBA Bows Before New York Community*, BROADCASTING, Aug. 20, 1984, at 67. In 1984, the National Institute for Low Power Television merged with the Community Broadcasters of America to form the Community Broadcasters Association.

<sup>60</sup> See *LPTV Seeks Power Upgrade, 4-Letter Calls, Other Full-Power Attributes*, COMM. DAILY, June 13, 1991 at 1; see also Harry A. Jessel, *CBA Asks FCC for LPTV Name Change*, BROADCASTING, June 17, 1991, at 62. The president of the National Association of Broadcasters voiced strong opposition to the proposed changes, calling them a "thinly veiled attempt to convert low-power TV stations, which are intended as a secondary service and licensed by lottery, into full-service facilities." *Id.*

<sup>61</sup> See *Mass Media*, COMM. DAILY, May 20, 1994, at 7. "Chmn. Hundt said agency's delay in acting upon petition by Community Bcstrs. Assn. (some 2 years) is a 'limited but very important example' of FCC delays caused by lack of staff and resources." *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *First Report and Order*, *supra* note 3, paras. 4-7.

<sup>64</sup> *Id.* para. 4.

<sup>65</sup> *Id.* para. 8.

<sup>66</sup> *Id.* para. 4. This standard was also known as the "complete and sufficient" standard. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See *Salzer v. FCC*, 778 F.2d 869, 871 (D.C. Cir. 1985) (holding that the FCC could adopt the "letter perfect" standard in light of the tremendous response of LPTV applications and the Commission's limited manpower).

By contrast, under the "substantially complete" standard, the FCC will return an LPTV application as "patently defective" only if the applicant has "omit[ted] all of or large portions of several sections of the application."<sup>69</sup> The applicant now has thirty days to cure "defects or omissions" rather than simply forfeiting the chance to file until the next filing window.<sup>70</sup> If the defect does not hinder the continued processing of the application, the staff will continue to process the application, and will send a deficiency letter only after completion of the pre-acceptance studies.<sup>71</sup> The Commission noted that it could process more applications with this new standard, and thereby grant more licenses for LPTV stations during each filing window.<sup>72</sup>

The Commission cited two reasons in its First Report and Order for the change in standard: 1) the decreased number of LPTV applications being filed; and 2) the higher quality of applications in general.<sup>73</sup> The Commission also noted that the previous, stricter standard had accomplished its goal of "encouraging applicants to submit complete and carefully prepared applications."<sup>74</sup> Additionally, several commentators regarded the lower application standard as more realistic in light of the typical LPTV applicant's limited resources.<sup>75</sup>

## 2. A Liberalized Terrain Shielding Policy

As previously discussed, LPTV stations are not permitted to cause any interference to other full-power stations.<sup>76</sup> The FCC has reserved the right to waive its strict non-interference standards for a proposed LPTV station in an area where there is another broadcast facility if the LPTV applicant can

demonstrate that the natural terrain forms a "shield" that prevents interference.<sup>77</sup> However, due to the large number of LPTV applications in the past, the FCC did not waive the standards in mutually exclusive cases, where two LPTV applications were received for the same channel in the same area.<sup>78</sup>

Under the new regulations, however, the FCC now will consider a showing of terrain shielding in situations where the application filed is mutually exclusive with another timely filed LPTV application.<sup>79</sup> In other words, two nearby LPTV stations still can receive licenses to operate on the same channel if both stations show that the terrain would shield one another from interference.<sup>80</sup> Additionally, the two LPTV applicants would not have to rely on the result of an FCC lottery to determine which applicant receives the license.<sup>81</sup> The ultimate result is that now many more LPTV stations can receive licenses to operate in locations on the same channel, without having to wait for the FCC to make a decision, thereby encouraging multiple LPTV stations in a given area.<sup>82</sup>

## 3. Four-letter Call Signs

When the FCC first authorized LPTV service, it decided to differentiate LPTV stations from full-power stations by issuing to LPTV stations a five-digit call sign.<sup>83</sup> The LPTV call sign was comprised of two numbers designating the channel on which they were to broadcast and three letters.<sup>84</sup> Under the May, 1994 changes, LPTV stations that have already received an FCC construction permit can now apply for a four-letter call sign, identical in all respects to those issued to full-power stations, except

<sup>69</sup> *First Report and Order*, *supra* note 3, para. 10. See also Review of the Commission's Rules Governing the Low Power Television Service, *Notice of Proposed Rule Making*, (MM Dkt. No. 93-114), 8 FCC Rcd. 2770, Apr. 22, 1993 at para. 7. "This standard does not focus on the importance of a particular omission, but on the cumulative impact of all the omissions." *Id.*

<sup>70</sup> *First Report and Order*, *supra* note 3, para. 11.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* para. 8.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* para. 4.

<sup>75</sup> *Id.* paras. 5, 8. In addition, the Commission itself noted that the lower application acceptance standard is more appropriate for most LPTV station applicants, who may not have the financial resources to hire an attorney or other specialist to insure the proper preparation of the application in order to comply with the previous stricter standard. *Id.*

<sup>76</sup> 1980 NPRM, *supra* note 8, para. 54.

<sup>77</sup> *Id.* para. 56.

<sup>78</sup> *Commission Amends Rules and Policies Governing Low*

*Power Television (LPTV) Service*, (MM Dkt. No. 93-114), FCC NEWS, May 19, 1994, para. 12. The Commission stated that "[c]onsideration of waivers based on terrain shielding is currently limited to LPTV applications that are not mutually-exclusive with other applications submitted during a particular filing window." *Id.* (emphasis added).

<sup>79</sup> *First Report and Order*, *supra* note 3, para. 12.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* para. 13.

<sup>82</sup> See *Multichannel for Rural Areas, Scrambled LPTV Service Expected to Grow, Offer Cable-Like Packages*, COMM. DAILY, May 20, 1994, at 2.

<sup>83</sup> 1980 NPRM, *supra* note 8; but cf. 47 C.F.R. § 73.3550(e)(1993). Full power television stations (as well as both AM and FM radio stations) are issued a four-letter call sign, beginning with the letter "W" if the station is located east of the Mississippi River, or "K" if located west of the Mississippi River, and three additional letters. *Id.*

<sup>84</sup> 47 C.F.R. § 74.783(d).

for an "LP" suffix.<sup>85</sup> LPTV stations that have been broadcasting the longest will be the first of those eligible to receive the new call signs.<sup>86</sup> This new rule does not apply to translator stations, since they have no need for four-letter call signs.<sup>87</sup>

The FCC hopes the changes will "reduce confusion to viewers, who are accustomed to four-letter call signs."<sup>88</sup> Indeed, the Commission noted concerns that the previous LPTV call signs caused the public to mistake LPTV stations for amateur radio operators.<sup>89</sup> Thus, it is anticipated that the new call signs will "allow the LPTV station to more effectively market itself to the public."<sup>90</sup> Viewers will still be able to differentiate between a full-power station and an LPTV station because of the "LP" suffix.<sup>91</sup> The Commission also indicated that it did not think the attachment of the "LP" suffix was unfair to LPTV broadcasters, because low power television is a "distinct broadcast service" that does not have to follow many of the same rules that full power stations follow.<sup>92</sup>

#### 4. Major Modifications to Existing LPTV Stations.

The FCC originally proposed a fourth change in LPTV rules regarding the definition of a "major" modification to an LPTV station.<sup>93</sup> The Commission noted that many of the so-called major changes that an LPTV station often seeks do not affect the power

of the station.<sup>94</sup> As such, the Commission proposed to narrow the definition of what constitutes a "major modification" for LPTV stations.<sup>95</sup> Such a change would alleviate considerable paperwork on behalf of LPTV owners and would ultimately make LPTV stations more attractive to broadcasters.

The FCC declined to address this matter, simply indicating that its proposed changes in rule making garnished "significantly more diverse comment" than the other proposals, and thus decided to wait to rule on the proposal at a later date in order to implement the other changes immediately.<sup>96</sup>

Final resolution of this last proposal will have a profound effect on the LPTV industry in the coming years. Obviously, it will help streamline the LPTV application process and encourage continued development of existing LPTV stations. Owners will not be forced to seek FCC approval before changing certain features of their station in an effort to make the station more competitive.<sup>97</sup>

#### B. LPTV and its Current Relationship with Cable Television

The failure in 1992 to achieve universal "must-carry" status for all LPTV stations apparently did not dissuade many LPTV owners from filing complaints with the FCC against cable operators who refused to carry LPTV signals.<sup>98</sup> These disputes are clear examples of the growing competition between

<sup>85</sup> *First Report and Order*, *supra* note 3, para. 22. The Commission still will issue the traditional five-character LPTV call sign to LPTV stations when awarding construction permits. Once the LPTV station receives its construction permit, it can then request the new four-letter LPTV call sign. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* para. 35. Translator stations merely rebroadcast a full-power station's signal. The Commission noted in its *First Report and Order* that, unlike LPTV stations that originate programming, call signs are not a "significant issue" for translator stations. *Id.* para. 19.

<sup>88</sup> *Id.* para. 17.

<sup>89</sup> *Id.* para. 19.

<sup>90</sup> *Id.* para. 21.

<sup>91</sup> *Id.* para. 23.

<sup>92</sup> *Id.* LPTV broadcasters are not limited by many of the restrictions that control full-power stations, including, *inter alia*, multiple ownership and public access rules or children's programming and local public filing requirements. *Id.*

<sup>93</sup> *In re Review of Commission's Rules Governing the Low Power Television Service, Notice of Proposed Rule Making*, 8 FCC Rcd. 2770, para. 15 (1993)[hereinafter 1993 NPRM].

<sup>94</sup> *Id.* para. 16. The Commission indicated that the original definition of what constituted a major modification was deliberately broad in a further effort to "exercise strict control over the parameters of these applications." *Id.*

<sup>95</sup> *Id.* para. 15. The Commission stated:

Generally we propose that any change or combination of changes in the transmission system of a low power television, television translator or television booster station. . . would not be considered a major change provided: (1) the changed facility would fully comply with the low power television interference protection standards; (2) the minor change application would not be mutually exclusive with any earlier-filed application and (3) the station's protected service contour ("footprint") resulting from the change would be suitably bounded.

*Id.*

<sup>96</sup> *First Report and Order*, *supra* note 3, para. 1.

<sup>97</sup> See *supra* text accompanying note 37. Any application filed with the Commission for a major modification to an LPTV station is subject to competing applications and petitions to deny.

<sup>98</sup> See *In Re Complaint of W53AO-TV against Crown Cable, Memorandum Opinion and Order*, 8 FCC Rcd. 8537 (1993)(awarding LPTV station mandatory carriage status in absence of response from local cable operator); *In Re Complaint of Lightning Broadcasting Co. against Enstar Communications, Memorandum Opinion and Order*, 9 FCC Rcd. 1910 (1994)[hereinafter *Enstar Memorandum*](holding that cable operator had not supported its contention that LPTV station's signal could not be carried due to poor quality); *In Re Complaint of Moran Communications, Inc. against Telemedia, Inc., Mem-*

LPTV and cable system operators.<sup>99</sup>

Part of this trend can be attributed to the fact that LPTV is often a less expensive and therefore more attractive alternative for those broadcasters seeking to offer multichannel service, especially in rural areas.<sup>100</sup> Acquiring and operating multichannel LPTV stations is cheaper and (for the moment) entails less bureaucratic restrictions for broadcasters than demanding mandatory carriage from already existing local cable systems.<sup>101</sup> Thus, the owner of a multichannel LPTV system can reach a greater audience without incurring the cost of or adhering to the same administrative restrictions as cable systems. Indeed, sources indicate that the unusually busy LPTV filing window that was held April 11-15, 1994, was partially the result of several "multiple filings by the same or affiliated entities in some areas."<sup>102</sup>

As a result of the increased competition, cable operators have fought back, offering a variety of excuses to justify their refusal to carry a seemingly otherwise qualified low power television station's signal. Most cite the "poor signal quality" of the LPTV station.<sup>103</sup> Others claim that LPTV stations lack a program schedule that demonstrates compliance with local programming requirements.<sup>104</sup> Still others simply refuse to answer the LPTV broadcaster's repeated requests for carriage altogether.<sup>105</sup> The FCC has denied only one request for mandatory carriage

by an LPTV station because of valid technical reasons, due solely to the fact that the application involved a station located within one of the 160 most populous areas.<sup>106</sup> In all likelihood, the U.S. District Court for the District of Columbia, when re-hearing *Turner*,<sup>107</sup> on remand, will hold that the government has sufficiently demonstrated that local broadcasters would suffer financial difficulties if must-carry status is denied.<sup>108</sup> If the district court does hold for the government, then mandatory carriage for qualified LPTV stations naturally follows, resulting in even more suits by LPTV broadcasters against cable system operators.

### III. A DEPARTURE FROM THE FCC'S ORIGINAL INTENTIONS IN SETTING UP LPTV AS A SECONDARY SERVICE

From its inception, LPTV was created as a secondary service, to provide "new ownership opportunities" for minorities and small businesses and to thus "assur[e] enhanced diversity of ownership and of viewpoints in television broadcasting."<sup>109</sup> With the May 19, 1994 changes, the Commission reaffirmed its commitment to the goal of offering first-time ownership of television stations to those who otherwise would not be able to enter the broadcasting market.<sup>110</sup>

*orandum Opinion and Order*, 9 FCC Rcd. 2415 (1994)[hereinafter *Moran Memorandum*](granting LPTV broadcaster's request for cable carriage in the absence of any justification of denial from the local cable operator); *In Re Complaint of Lightning Broadcasting Co. against Warner Cable of Altamont, Memorandum Opinion and Order*, 9 FCC Rcd. 2297 (1994)[hereinafter *Warner Memorandum*](holding, *inter alia*, that cable operator's showing that LPTV station's signal was of poor quality, was insufficient to deny carriage); *In re Complaint of Lightning Broadcasting Company against Capital Cable Partners, Memorandum Opinion and Order*, 9 FCC Rcd. 2315 (1994)[hereinafter *Capital Cable Memorandum*](holding that cable operator's claim that LPTV signal did not meet required signal level was not supported by engineering data); *In re Complaint of Continental Broadcasting Corp. against Jones Intercable, Inc., Memorandum Opinion and Order*, 9 FCC Rcd. 2550 (1994)(holding that LPTV broadcaster could not request mandatory carriage from cable operator because station was located in one of the 160 largest Metropolitan Statistical Areas).

<sup>99</sup> *Scrambled LPTV Service Expected to Grow, Offer Cable-like Packages*, COMM. DAILY, May 20, 1994, at 2.

<sup>100</sup> *Id.* As a result of technology limitations, most LPTV stations cannot offer more than 10 to 20 channels, limiting the appeal of LPTV multi-channel service to those areas that are not served by large cable systems. *Id.*

<sup>101</sup> See, e.g., *Enstar Memorandum*, *supra* note 98; *Warner Memorandum*, *supra* note 98; *Capital Cable Memorandum*, *supra* note 98. Of course, these stations must first be "qualified

low power stations" in order to demand mandatory carriage from a cable operator. See *supra* note 47.

<sup>102</sup> *Scrambled LPTV*, *supra* note 99, at 2.

<sup>103</sup> *Enstar Memorandum*, *supra* note 98; see also *Capital Cable Memorandum*, *supra* note 98.

<sup>104</sup> *Warner Memorandum*, *supra* note 98. The FCC awarded W41BL "must-carry" status anyway, noting that the LPTV station had provided enough documentation to satisfy the requirements of 47 U.S.C. § 534. *Id.*

<sup>105</sup> *In Re Complaint of W53AO-TV against Crown Cable*, 8 FCC Rcd. 8537 (1993).

<sup>106</sup> *In Re Complaint of Continental Broadcasting Corp. v. Jones Intercable, Inc.*, 9 FCC Rcd. 2550 (1994). The FCC ultimately denied "must-carry" status to the LPTV station, because station K59DB ("Channel 59") was located in Albuquerque, New Mexico, one of the 160 largest metropolitan areas in the United States. *Id.*

<sup>107</sup> See *supra* note 57.

<sup>108</sup> *Id.* The Supreme Court already has recognized that the government has a legitimate interest in protecting local broadcasting and that the mandatory carriage provisions of the Cable Act are content-neutral. *Id.*

<sup>109</sup> 1980 NPRM, *supra* note 8, para. 76.

<sup>110</sup> *Action in Docket Case—Commission Amends Rules and Policies Governing the Low Power Television (LPTV) Service* (MM Dkt. 93-114), FCC NEWS, May 19, 1994. "The Commission noted that the service has provided substantial first-time ownership for small businesses and members of minority groups.



While it is laudatory that LPTV is now finally perched on the verge of becoming a viable and even profitable broadcast service, the result may be that the very groups for which LPTV was designed to provide broadcasting opportunities, are in jeopardy of being bumped from the picture.

The Commission, in 1980, recognized that the implementation of LPTV service would offer competition to cable television, especially in rural areas and "densely populated urban areas where the cost of laying cable is extremely high."<sup>111</sup> The increasing trend of LPTV owners offering cable-like services that charge fees<sup>112</sup> (albeit cheaper fees than cable), detracts from accomplishing this goal. Some commentators have predicted that since there aren't enough customers in rural areas for both LPTV stations and cable operators, the two would be forced to form partnerships.<sup>113</sup> One can only wonder what result such a partnership might bring upon those communities who have come to depend on LPTV service as the only broadcasting service they can afford or receive.<sup>114</sup>

Furthermore, it appears that huge communications corporations like Warner Brothers and Paramount are hungrily eyeing LPTV stations as a cheap and quick way to develop television networks.<sup>115</sup> Once acquired, it is illogical that these businesses would want their LPTV stations to remain part of a secondary service. Instead, it is likely that these large corporations will pressure the FCC to upgrade the stations to equal footing with the full-power stations of other networks.

Indeed, we have already seen similar results on a more limited scale in the late 1980s and early 1990s when satellite television services such as the Home Shopping Network<sup>116</sup> and religious powerhouse broadcasters such as Trinity Broadcasting gobbled up several LPTV stations in an effort to expand

their networks.<sup>117</sup> Such examples are considerably removed from the FCC's idealistic vision of "mom and pop" LPTV stations serving the specific needs of the local communities and businesses.

But there are other, more recent examples that amply demonstrate the original potential of LPTV. In September of 1994, the St. Petersburg, Florida city council purchased a defunct LPTV station from an out-of-state corporation for \$196,000.<sup>118</sup> In doing so, city officials hoped to reach nearly 47,000 households that did not or could not receive cable television.<sup>119</sup> The City plans to broadcast council meetings, board meetings, police instructional shows, and even hazardous weather announcements.<sup>120</sup> The FCC envisioned precisely this type of use when authorizing LPTV service in 1980. Thus, the citizens of St. Petersburg will benefit from the specialized local broadcasting of their newly acquired station at a low purchase and operating cost.<sup>121</sup>

There are other notable LPTV success stories. Channel 62 (K62EG) in St. Louis is staffed entirely by volunteers and runs programs featuring local religious issues, as well as old movies.<sup>122</sup> The parish that operates Channel 62 eventually hopes to broadcast religious services from a variety of local churches.<sup>123</sup>

The New York area, however, offers sharp contrasts in both the problems and successes offered by LPTV. LPTV applicants for Channel 19 in New York City have waited in limbo for more than thirteen years to set up a station.<sup>124</sup> On the other hand, Channel 23 located on the eastern tip of Long Island, has a considerably brighter future. Channel 23, owned and operated by brothers Gregory and Ernest Schimizzi, began broadcasting in October 1994.<sup>125</sup> They hope to use the LPTV station to broadcast live local television programs geared towards residents

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Small businesses have also benefitted because of the more affordable advertising rates, and the ability to target advertising to specialized audiences." *Id.*

<sup>111</sup> 1980 NPRM, *supra* note 8, para. 30.

<sup>112</sup> See discussion, *supra* part II.B.

<sup>113</sup> LPTV Emulating Cable, *supra* note 2, at 6.

<sup>114</sup> Mark I. Pinsky, *Outlets for Forgotten Viewers, Low-power Television Serves Those Beyond the Reach of Either Cable or Conventional Broadcasters*, L.A. TIMES, Apr. 19, 1990, at A1 (describing LPTV stations that serve both Native American communities in the Southwest as well as impoverished areas of urban cities, such as the Bronx).

<sup>115</sup> Barbara Ballman, *Larson Extending Low-Power TV's Reach*, CAP. DISTRICT BUS. REV., July 4, 1994, at 4.

<sup>116</sup> Home Shopping Network Aims for 200-500 LPTV Stations in 5 Years, COMM. DAILY, Nov. 3, 1989, at 3.

<sup>117</sup> Survey Says, *supra* note 1, at 3.

<sup>118</sup> David K. Rogers, *Soon Nearly All Can Tune Into St. Petersburg Council*, ST. PETERSBURG TIMES, Sept. 16, 1994, at 1 (describing how city officials purchased W35AJ from the Connecticut-based Channel America LPTV Inc.).

<sup>119</sup> *Id.*

<sup>120</sup> Rogers, *supra* note 118, at 1.

<sup>121</sup> David K. Rogers, *Soon Nearly All Can Tune Into St. Petersburg Council*, ST. PETERSBURG TIMES, Sept. 16, 1994, at 1. City officials expect the station to cost about \$65,000 to operate annually. *Id.*

<sup>122</sup> Mark Schlinkmann, *Low-Power TV Here Has Low Level of Local Input*, ST. LOUIS POST DISPATCH, Dec. 26, 1993, at 1E.

<sup>123</sup> *Id.*

<sup>124</sup> Mass Media, COMM. DAILY, Aug. 29, 1994, at 5.

<sup>125</sup> Mary Cummings, *Commercial TV Starting on East End*, N.Y. TIMES, Oct. 9, 1994, at B18.

and tourists alike.<sup>126</sup> However, the Schimizzis recognize that it would be hard to broadcast local programs twenty-four hours a day and still make the station profitable and marketable to advertisers. The Schimizzis have opted for a healthy dose of local programming along with regular satellite features from the Cable News Network, music videos, and political talk shows.<sup>127</sup>

Such an approach offers the perfect blend of providing a community focus for giving local businesses a ready and affordable advertising source, while at the same time providing a national scope. Skeptics of LPTV's potential need only look to such examples as indications that low power television can be profitable, while still offering local communities the television coverage that they need.<sup>128</sup>

It is cynical to suggest that low income and ethnic minority inhabitants in high-priced urban markets in the Bronx cannot obtain the same LPTV relief enjoyed by their more affluent Long Island neighbors. Low power television was meant to accomplish the FCC's goal of universal television coverage for all regions in the United States, especially those areas that are often overlooked by more traditional broadcasting sources.

#### IV. CONCLUSION

LPTV has always had the potential to make a substantial contribution to the FCC's realization of universal television service for all Americans. At the same time, LPTV offered ownership and management opportunities for minorities and small businesses who were otherwise excluded from traditional television broadcasting. Unfortunately, it now appears that there are those that are less interested in spreading the benefits of LPTV and more than willing to subvert the service to suit their own special interests.

It would be unfortunate if the FCC's goals in creating LPTV service were circumvented in an effort to make LPTV stations more like full power television stations. LPTV never was intended to be like full power television. But that should not be read to suggest that LPTV is a failure as a broadcasting service just because, by its very design, it cannot match the money generating capabilities of either full power television or cable systems. While the FCC did design LPTV to be a secondary service, the FCC nonetheless expected LPTV to perform a noble function in providing a vital communication service to those who otherwise fell outside the traditional broadcast spectrum. LPTV should be jealously protected so that the service lives up to its original purpose and ideals.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* Channel 23 is a CNN affiliate.

<sup>128</sup> *Id.* Indeed, even in relatively affluent east Long Island,

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Channel 23 is "the first commercial television station intended specifically for East End viewers." *Id.*